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No. 09-2

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

FLAHERTY & CRUMRINE PREFERRED INCOME FUND INCORPORATED, et al.,

Petitioners,

v.

TXU CORP., et al.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF IN OPPOSITION

GERARD G. PECHT*
RICHARD S. KRUMHOLZ
FULBRIGHT & JAWORSKI L.L.P.
2200 Ross Avenue, Suite 2800
Dallas, Texas 75201
(214) 855-8050

PETER A. STOKES
FULBRIGHT & JAWORSKI L.L.P.
600 Congress, Suite 2400
Austin, Texas 78701
(512) 536-5287

* *Counsel of Record* *Counsel for Respondents*

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

QUESTION PRESENTED

Whether the Court of Appeals correctly applied the well-settled pleading requirements for fraudulent intent under the Private Securities Litigation Reform Act and Federal Rules of Civil Procedure 8 and 9(b) to the particular facts in this case in affirming the dismissal of petitioners' complaint.

RULE 29.6 STATEMENT

TXU Corp. is now known as Energy Future Holdings Corp.. Energy Future Holdings Corp. has no parent corporation, and no publicly held company owns 10% or more of its stock.

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BRIEF IN OPPOSITION

INTRODUCTION

Respondents TXU Corp. (now known as Energy Future Holdings Corp.) ("TXU") and C. John Wilder ("Wilder") oppose the petition for certiorari because, among other reasons, the Court of Appeals' decision (1) does not raise any novel or disputed issues of law; (2) involves a correct application of settled law to what petitioners concede are "unique" factual circumstances; and (3) presents an inappropriate, ill-timed, and highly fact-specific vehicle for addressing the questions presented.

The petition identifies no disputed legal question warranting certiorari. In unanimously affirming

dismissal of petitioners' claims, the Fifth Circuit correctly applied the Private Securities Litigation Reform Act ("PSLRA") and Federal Rules of Civil Procedure 8 and 9(b) to the particular facts of this case in determining that the complaint failed to allege a sufficient inference of fraudulent intent. The petition raises no salient question of law not fully addressed in this Court's recent opinions in *Bell Atl. Corp.* v. *Twombly*, 550 U.S. 544 (2007) and *Tellabs, Inc.* v. *Makor Issues & Rights, Ltd.*, 551 U.S. 308 (2007). Indeed, *Ashcroft* v. *Iqbal*, 129 S. Ct. 1937 (2009), puts to rest any notion that the Fifth Circuit applied an incorrect pleading standard. Petitioners do not and cannot explain how the Fifth Circuit's standard for pleading fraudulent intent under Rules 8 and 9(b), which requires "'particularized facts supporting an inference of fraud,'" Pet. App. 22a (citation omitted), differs from the standard articulated in *Twombly* and *Iqbal* that a complaint's factual allegations must support a plausible inference of the required state of mind.

Iqbal also forecloses petitioners' Rule 9(b) "circuit split" argument by squarely holding, in full accord with the Fifth Circuit's decision, that conclusory assertions of scienter are insufficient. In any event, petitioners mischaracterize the circuits' application of Rule 9(b) and overlook decisions from other circuits that are fully consistent with the approach taken by the Fifth Circuit and this Court.

Petitioners' suggestion that the Fifth Circuit applies a different pleading standard to "business fraud" cases likewise rings hollow. The petition does not and cannot cite a single Fifth Circuit decision applying a different or more lenient standard in cases not involving "business fraud." To the contrary,

the Fifth Circuit has consistently applied the pleading standards under the Federal Rules of Civil Procedure and the PSLRA.

Nor does this case merit special attention merely because it involves a "self-tender" offer under the Williams Act. Petitioners fail to identify any circuit split or nationwide controversy over the pleading standard for private civil claims under the Williams Act provision at issue, 15 U.S.C. § 78n(e) ("Section 14(e)"). To the contrary, courts addressing Section 14(e) have uniformly held that plaintiffs must plead and prove scienter to the same extent as under Section 10(b) and Rule 10b-5. All such claims are governed by *Tellabs*, a decision the Fifth Circuit faithfully applied.

In the end, the petition devolves into a garden-variety protest that the appellate court incorrectly weighed the inferences from petitioners' factual allegations. Petitioners' argument that the Fifth Circuit "misweighed" the inferences fails. As petitioners concede, TXU expressly disclosed that it was reviewing its dividend and stock-repurchase policies during the tender offer. Everything TXU stands accused of doing is consistent with that disclosure. But in any event, as petitioners also repeatedly concede, the fact pattern of this case is "unique." Pet. 6, 7, 8. There is no reason why this unique context-specific fact pattern, which is merely one of many possible permutations and combinations of facts that may arise in securities fraud cases, merits further review. The applicable pleading standards have already been addressed by this Court several times during the past three years, and any decision with respect to this case would necessarily

be limited to its facts and would offer little precedential value or guidance for future cases.

It is little wonder why this case was dismissed twice in the district court and affirmed unanimously on appeal. The petition should be denied.

COUNTERSTATEMENT

A. The Factual Allegations

This is a federal and state law fraud action against TXU and its former CEO, Wilder. Petitioners voluntarily sold their convertible TXU debt securities to TXU in October 2004 through a tender offer in which they received a substantial premium over the then-current market price of the securities. Despite the considerable returns petitioners reaped on their investment in TXU, petitioners complain that they would have profited even more had they declined the tender offer and retained their TXU securities, which rose in value when TXU announced a dividend increase and stock repurchase.

Petitioners assert that TXU and Wilder acted with intent to defraud or severe recklessness when they allegedly misrepresented or failed to disclose during the tender offer whether those future events would occur. Petitioners, however, allege no facts demonstrating that TXU knew with certainty *before* the close of the tender offer that its management would recommend a dividend increase or change in the stock repurchase plan to TXU's Board of Directors at any particular time, let alone that TXU's Board would approve either one.

Instead, as demonstrated by petitioners' own factual allegations, TXU expressly disclosed that it was reviewing the policies at issue:

- TXU disclosed on May 18, 2004, four months before the tender offer was made, that "management would recommend that the Board of Directors reevaluate the current dividend policy" after the company met certain financial goals. Pet. App. 63a-64a. TXU further disclosed that the company's capital allocation program "will enable management to recommend an increase of the dividend in 2006." *Id.* The May 18 press release also stated that "the Board of Directors may consider other relevant factors in determining if and when to make a change in the dividend policy." *Id.*
- After substantial improvement in TXU's business over the summer, TXU disclosed on September 15, 2004, at the beginning of the tender offer, that this "evaluation" and "review"—previously estimated to take place in 2006—had already begun and was ongoing. Pet. App. 67a-68a. The September 15 disclosure stated that

> [a]s a part of its capital management and restructuring program and considering current business and market conditions, TXU Corp.'s management is evaluating whether it should recommend to the TXU Corp. Board of Directors that they reevaluate TXU Corp.'s current common stock dividend policy. *TXU Corp. cannot predict the outcome of management's evaluation, when, if at all, management would make a recommendation to the Board of Directors to change the current common stock dividend policy, or what management's recommendation might be.*

> In addition to any recommendation from management, the Board of Directors may consider other relevant factors in determining if and when to make a change in TXU Corp.'s common stock dividend policy.

Id. (emphasis added). This statement was included in a September 15, 2004 press release and Form 8-K, which was filed with the SEC, and was incorporated verbatim into the tender offer document itself. *Id.*

- TXU also disclosed, in a September 28, 2004 presentation by its CEO filed with the SEC before petitioners tendered their securities, that both the dividend and stock-repurchase policies were "[u]nder review," and that TXU was in the process of determining "[h]ow much cash we should return to our shareholders." *See* Pet. App. 70a, 170a.

Contrary to petitioners' contentions, none of these disclosures was "boilerplate." Pet. 21-22. Rather, each was specifically tailored to TXU's particular circumstances at the time it was made.

Despite these express disclosures, petitioners argue that TXU and Wilder committed fraud because the company (i) hired a financial advisor to review the dividend issue; (ii) communicated with credit rating agencies during the tender offer and provided them with detailed information about the dividend policy before the tender offer closed; (iii) provided dividend-related materials to the Board after the tender offer had closed, and scheduled an October 22, 2004 Board meeting to discuss the dividend and stock repurchase issues; and (iv) approved a dividend increase and

stock repurchase during that Board meeting and announced them on October 25, 2004.

But each of these actions is fully consistent with TXU's disclosure that it was "review[ing]" and "evaluat[ing]" its dividend and stock repurchase policies. The complaint pleads no facts demonstrating that TXU management was in a position to recommend a dividend or stock repurchase increase before receiving feedback from the credit rating agencies about the likely impact of such an increase on the company's credit rating, or that the company received such feedback before the tender offer closed.

In fact, far from supporting an inference of fraud, the purported "expert report" attached to petitioners' own complaint undermines petitioners' argument that TXU management knew all along what the credit rating impact of a dividend increase or stock repurchase would be. The report concedes that: (i) credit ratings are highly subjective and "complex," are "predicated on a host of qualitative or judgmental factors," and are "as much an art as * * * a science"; (ii) rating agencies "would have been particularly careful in evaluating companies with only marginally investment grade credit ratings" such as TXU, which had a near-junk rating at the time; (iii) during October 2004, "Moody's was conducting overwhelmingly negative rating actions, reviews, and outlooks in the utilities industry" due to the continued fallout from Enron's collapse; (iv) nearly 30% of companies that increased their dividends by more than 100% from 2000-06 suffered a ratings downgrade; (v) TXU's energy trading business depended on having an investment-grade rating; and (vi) "[a] single notch decline" in TXU's rating would have had "disastrous

effects on the Company * * *." Pet. App. 117a-125a, 142a-143a, 164a.

B. The Decisions Below

Petitioners originally filed this case as a federal class action under Sections 10(b) and 14(e) of the Securities Exchange Act without asserting any state law claims. The district court granted petitioners' initial motion to dismiss on August 30, 2006, holding that the "quantum of facts" alleged by petitioners failed to support a strong inference of scienter, as is required for such claims. *Flaherty & Crumrine Preferred Income Fund Inc.* v. *TXU Corp.*, No. 3:05-CV-1784-G, 2006 WL 2583212, at *6-7 (N.D. Tex. Aug. 30, 2006) (observing that petitioners' allegations "do not plainly invalidate" TXU's disclosures and that "hiring a financial advisor and submitting a financial plan to credit rating agencies appears to substantiate the defendants' disclosure that the dividend policy was under review"). Because this Court decided *Tellabs* while petitioners were pursuing their initial appeal, the Fifth Circuit vacated the district court's first dismissal without consideration of the merits and remanded to give the district court an opportunity to evaluate the allegations under *Tellabs*. *Flaherty & Crumrine Preferred Income Fund Inc.* v. *TXU Corp.*, 242 Fed. Appx. 253 (5th Cir. Sept. 18, 2007).

Following remand, petitioners amended their complaint to add a non-class claim for common law fraud, which they have now made the centerpiece of their petition for certiorari. The amended complaint also included an "expert" report from Professor Linda Allen, a law professor who claimed expertise concerning credit rating agencies. After allowing the amendment, the district court applied *Tellabs* to the

amended complaint and again determined that petitioners failed to state a claim. Pet. App. 27a. As *Tellabs* requires, the district court took petitioners' "well-pleaded facts" as true, evaluated petitioners' allegations "holistically," and compared the overall "quantum of facts" to those in other decisions to determine whether a strong inference of scienter was pled. *Id.* at 36a-46a. The court concluded that "there is hardly more substance to [petitioners'] current claims than in their initial complaint" and that "professor Allen's assessment of the facts does little to establish a strong inference of scienter." *Id.* at 44a & n.11. The court also dismissed the common law fraud claim, holding that the allegations "fail to show *how* each statement was fraudulent." *Id.* at 47a.

The Fifth Circuit unanimously affirmed the district court's second dismissal. Pet. App. 1a. The court observed that "it is not clear that Appellees ever issued a materially misleading statement or omission of fact concerning the dividend policy." *Id.* at 16a. In particular, "the statement that the dividend policy was 'under review' conveyed that TXU had taken some steps in evaluating a change in the dividend policy * * * ." *Id.* at 17a. After "[t]aking into account all of the facts in the aggregate, as well as inferences opposing fraudulent intent," the court held that "Appellants have failed to raise a strong inference that TXU, and specifically Wilder, acted with the intent to deceive, manipulate, or defraud or acted with severe recklessness in making statements concerning the dividend policy." *Id.* at 21a. The court also affirmed dismissal of the common law fraud claim, holding that the allegations "do not suffice to establish an inference of fraud under Rule 9(b)." *Id.* at 23a.

One day after issuing its opinion in this matter, the Fifth Circuit reversed the dismissal of another securities fraud lawsuit involving a different company. *Lormand* v. *US Unwired, Inc.*, 565 F.3d 228 (5th Cir. 2009). As demonstrated by *Lormand* and numerous other cases, the Fifth Circuit is more than willing to sustain pleadings that meet the requirements of the PSLRA and Rule 9(b) depending on the individualized facts of each case. This case, however, fell far short of the applicable pleading requirements and was properly dismissed.

REASONS FOR DENYING THE PETITION

I. THE PETITION IDENTIFIES NO EXISTING CIRCUIT SPLIT OR UNSETTLED QUESTION OF LAW.

Petitioners' two questions presented focus entirely on their common law fraud and Section 14(e) claims and, tellingly, do not address their securities fraud claim under Section 10(b). Because the scienter requirement for Section 10(b) claims was thoroughly addressed in *Tellabs*, it is hardly surprising petitioners struggle to find some other basis for certiorari. Neither of the questions presented, however, provides any reason to accept this case.

A. There Is No Circuit Split Or Unsettled Question Of Law Regarding The Standards For Pleading Intent Under The Federal Rules.

Petitioners first suggest the Court should grant certiorari to address a purported nationwide controversy over the meaning of Rule 9(b)'s prescription that "state of mind" allegations can be "alleged generally." This supposed controversy does not exist and, even if it did, would not be implicated

in this case. *Iqbal* expressly holds, following *Twombly*, that Rule 9(b)'s "alleged generally" language does not relieve parties from the strictures of Rule 8 in pleading the required state of mind. To the extent any prior decisions suggest otherwise, *Twombly* and *Iqbal* clearly control and foreclose petitioners' argument. But in any event, the cases cited in the petition evince no circuit split.

1. Petitioners' Alleged Circuit Split Is Not Implicated Here Because *Twombly* And *Iqbal* Definitively Resolve The Standard For Pleading Intent.

In *Iqbal*, the Court reiterated its prior holding in *Twombly* that even in a "notice pleading" case under Rule 8, "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Iqbal*, 129 S. Ct. at 1949 (quoting *Twombly*, 550 U.S. at 570). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* (citing *Twombly*, 550 U.S. at 556). "Where a complaint pleads facts that are 'merely consistent with' a defendant's liability, it 'stops short of the line between possibility and plausibility of 'entitlement to relief.'" *Id.* (quoting *Twombly*, 550 U.S. at 557). Determining whether a complaint states a "plausible" claim is "a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Id.* at 1950.

Iqbal also specifically addresses the state-of-mind requirement under Rule 9(b), which is the primary ground for certiorari urged here. Much as petitioners have done, the plaintiff in *Iqbal* sought refuge in

Rule 9(b)'s statement that intent may be alleged "generally." *Id.* at 1954. The Court rejected that assertion, holding that Rule 9(b)'s "alleged generally" language "does not give [a plaintiff] license to evade the less rigid—though still operative—strictures of Rule 8," and "does not empower [the plaintiff] to plead the bare elements of his cause of action, affix the label 'general allegation,' and expect his complaint to survive a motion to dismiss." *Id.* Applying the general standard of Rule 8 as elucidated in *Twombly*, the Court held that the respondent's complaint failed to plead sufficient facts to support a plausible inference of discriminatory intent. *Id.*

Accordingly, there can be no circuit split over the pleading requirement for fraudulent intent because this Court has definitively resolved the issue. Under *Twombly* and *Iqbal*, the well-pled factual allegations must support a plausible inference of the required state of mind. Any prior circuit court decisions that can be read as holding otherwise have been superseded by *Twombly* and *Iqbal*.

2. Petitioners' Alleged Circuit Split Is Illusory In Any Event.

Leaving aside this Court's resolution of the standard for pleading intent under the Federal Rules, the various pre-*Iqbal* cases cited on pages 19-21 of the petition as evidence of a purported "circuit split" fail to demonstrate any such controversy. Particularly given the recent guidance from this Court, the present case would not be decided differently in any of those circuits.

For example, petitioners note that in *U.S. ex rel. SNAPP, Inc.* v. *Ford Motor Co.*, 532 F.3d 496 (6th Cir. 2008), the Sixth Circuit remarked that a defendant's

state of mind need only be pled "generally," quoting the language in Rule 9(b). Pet. 19. But they fail to mention that the Sixth Circuit *affirmed* the Rule 9(b) dismissal in *SNAPP* and emphasized that a complaint must state enough facts to support a "plausible" claim. 532 F.3d at 502. That holding is entirely consistent with the Fifth Circuit's decision in this case.

Petitioners also cite *Anderson* v. *Sara Lee Corp.*, 508 F.3d 181 (4th Cir. 2007). Pet. 19. But petitioners fail to mention that on appeal, the defendant in *Anderson* "[t]ellingly" did not rely "on the proposition that the Class Action Complaint fails to allege the intent to deceive" and argued for affirmance based solely on reliance grounds. 508 F.3d at 189 n.8. No such issue is present in this case.

Petitioners next cite *Hefferman* v. *Bass*, 467 F.3d 596 (7th Cir. 2006). Pet. 19. But petitioners' characterization of *Hefferman* oversimplifies the state of the law in that circuit. The *Hefferman* court applied a pre-*Twombly* "notice pleading" standard (under which "the plaintiff is not required to plead either facts or legal theories") and distinguished the pre-*Twombly* federal Rule 8 regime from the requirement in Illinois state courts that "'the plaintiff must allege facts sufficient to bring a claim within a legally recognized cause of action, not simply conclusions.'" 467 F.3d at 599. As the Seventh Circuit now recognizes, *Twombly* has supplanted this lenient application of Rule 8. *See Hecker* v. *Deere & Co.*, 556 F.3d 575, 580 (7th Cir. 2009) (following *Twombly*, a complaint must allege "enough facts to state a claim to relief that is plausible on its face") (internal quotation marks and citations omitted).

Petitioners also cite *Morganroth & Morganroth* v. *Norris, McLaughlin & Marcus, P.C.*, 331 F.3d 406 (3d Cir. 2003), and *In re Navarre Corp.*, 299 F.3d 735, 742 (8th Cir. 2002). Pet. 19-20. Again, however, petitioners' descriptions of those cases omit key distinctions. In *Morganroth*, the Third Circuit listed the numerous detailed facts pled in the complaint and held that "[t]he fraud allegations are sufficiently particular because they allege specific actions by which defendants exceeded the bounds of advocacy." 331 F.3d at 414 n.2. The entirety of the court's Rule 9(b) analysis was contained in a single footnote and does not support the proposition that parties need not plead facts supporting a plausible inference of fraud. In *In re Navarre*, the Eighth Circuit merely quoted Rule 9(b); it did not hold that a plaintiff was excused from pleading facts supporting a plausible claim. 299 F.3d at 742.

Petitioners' final two citations on this issue likewise fail to demonstrate a circuit split. In *Wight* v. *BankAmerica Corp.*, 219 F.3d 79, 92 (2d Cir. 2000), the court specifically analyzed whether the factual allegations demonstrated "the requisite knowledge on the part of [the defendant]," using an approach virtually indistinguishable from the Fifth Circuit's. *Id.* And in *West Coast Roofing & Waterproofing, Inc.* v. *Johns Manville, Inc.*, 287 Fed. Appx. 81 (11th Cir. 2008), the court expressly held that Rule 9(b) "requires more than conclusory allegations that certain statements were fraudulent; it requires that a complaint plead facts giving rise to an inference of fraud." *Id.* at 86. This unpublished decision has no precedential value even in the Eleventh Circuit, and is in any event consistent with the Fifth Circuit's decision in this case.

In addition to their failure to establish a circuit split, petitioners have not cited any authority to substantiate their claim that the Fifth Circuit applies a "heightened" Rule 9(b) standard to certain types of fraud actions but not others. Pet. 20. Contrary to petitioners' assertion, the Fifth Circuit has faithfully and consistently applied the same "inference of fraud" standard in all cases under Rule 9(b), sometimes allowing dismissals, sometimes reversing. *See Dorsey* v. *Portfolio Equities, Inc.*, 540 F.3d 333, 341-43 (5th Cir. 2008) (analyzing whether complaint supported "inference of scienter" and reversing dismissal of fraud claim); *Am. Realty Trust, Inc.* v. *Hamilton Lane Advisors, Inc.*, 115 Fed. Appx. 662, 667-68 (5th Cir. 2004) (applying "inference of fraud" test and affirming dismissal of fraud claim); *U.S. ex rel. Willard* v. *United Health Plan of Tex. Inc.*, 336 F.3d 375, 385 (5th Cir. 2003) (applying "inference of fraud" test to False Claims Act case and affirming dismissal). Petitioners cite no authority for their claim that the Fifth Circuit applies a different standard in "business fraud" cases than in "ordinary" fraud cases.

The cases from other circuits cited by petitioners similarly apply no double standard. In *U.S. ex rel. Wilson* v. *Kellogg Brown & Root, Inc.*, 525 F.3d 370 (4th Cir. 2008), the court simply adopted the same articulation of Rule 9(b) endorsed in *Iqbal*. *See id.* at 379 ("Although '[m]alice, intent, knowledge, and other conditions of a person's mind may be alleged generally,' * * * an FCA plaintiff still 'must set forth specific facts that support an inference of fraud'") (quoting *Willard*, 336 F.3d at 385). Likewise, *North Am. Catholic Educ. Programming Found. Inc.* v. *Cardinale*, 567 F.3d 8, 13 (1st Cir. 2009), applies the

Twombly-Iqbal rule that requires plaintiffs to set forth specific facts that make it "reasonable to believe that defendant(s) knew that a statement was materially false or misleading." None of these decisions holds that Rule 9(b) applies differently in particular types of fraud cases.

Thus, there is no disagreement in the circuits. The cases cited in the petition are consistent with each other, as well as with the legions of other circuit court decisions applying the same rule as set forth in *Twombly* and *Iqbal—i.e.*, that a complaint must set forth sufficient factual allegations to support a plausible inference of the required state of mind.[1]

B. There Is No Circuit Split Or Unsettled Question Of Law Regarding The Pleading Standards For Section 14(e) Claims.

Petitioners also suggest the Court should grant certiorari to clarify the standards for pleading a

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[1] *See, e.g., Eternity Global Master Fund Ltd.* v. *Morgan Guar. Trust Co. of N.Y.*, 375 F.3d 168, 187 (2d Cir. 2004) ("Although '[m]alice, intent, knowledge and other condition of mind of a person may be averred generally,' * * * this leeway is not a 'license to base claims of fraud on speculation and conclusory allegations'") (citation omitted); *In re Burlington Coat Factory Secs. Litig.*, 114 F.3d 1410, 1418 (3d Cir. 1997) ("While state of mind may be averred generally, plaintiffs must still allege facts that show the court their basis for inferring that the defendants acted with 'scienter'"); *DiLeo* v. *Ernst & Young*, 901 F.2d 624, 629 (7th Cir. 1990) ("Although [Rule] 9(b) does not require 'particularity' with respect to the defendants' mental state, the complaint still must afford a basis for believing that plaintiffs could prove scienter."); *K-Tel Int'l Inc. Sec Litig.* v. *K-Tel Int'l Inc.*, 300 F.3d 881, 894 (8th Cir. 2002) (holding that "'conclusory allegations' do not satisfy the pleading requirements of [FRCP] 9(b)," and that "unsupported allegations with regard to motives generally possessed by all corporate directors and officers are insufficient" to plead fraudulent intent under Rule 9(b)).

Section 14(e) claim. Pet. i. But these standards require no such clarification. Courts have uniformly held that Section 14(e) claimants must plead and prove scienter to the same extent as Section 10(b) claimants. *See, e.g., S.E.C.* v. *Ginsburg*, 362 F.3d 1292, 1297-98 (11th Cir. 2004) ("to establish liability under § 10(b) and §14(e) * * *, the SEC must prove that [the defendant] acted with scienter"); *In re Digital Island Secs. Litig.*, 357 F.3d 322, 328-29 (3d Cir. 2004) ("Section 14(e) is 'modeled on the antifraud provisions of § 10(b) * * * and Rule 10b-5,' which require proof of scienter.") (citations omitted); *Conn. Nat'l Bank* v. *Fluor Corp.*, 808 F.2d 957, 961 (2d Cir. 1987) ("Insofar as [§ 10(b)] cases deal with the adequacy of allegations of scienter, they are applicable to claims under the Williams Act."). Petitioners cite no authority for their apparent belief that "tender offer" cases under Section 14(e) are subject to a lower scienter requirement than "regular" Section 10(b) cases. Nor do petitioners cite any disagreement among the circuits over the scienter requirement for Section 14(e) claims.

Given that Section 14(e) has the same scienter requirement as Section 10(b), this Court's analysis of the scienter requirement in *Tellabs* controls petitioners' Section 14(e) claim to the same extent as their Section 10(b) claim. In *Tellabs*, this Court held that a Section 10(b) complaint must allege particularized facts supporting an inference of fraudulent intent that is "cogent and at least as compelling as any opposing inference of nonfraudulent intent." *Tellabs*, 551 U.S. at 314. The district court must perform a "comparative assessment" of competing inferences to determine whether facts giving rise to a strong inference have been pled. *Id.* at 2511-12. Petitioners

do not even suggest that the district court or Fifth Circuit misapplied this well-settled test. And given that this Court squarely addressed the scienter requirement in *Tellabs*, there is no reason to grant certiorari here to address the scienter issue yet again.

Petitioners attempt to manufacture controversy by citing cases from other circuits involving "cautionary language." Their citations are misleading; the decisions petitioners reference address the effect of cautionary language on the distinct elements of materiality and falsity, rather than the scienter requirement at issue in this appeal. *See* Pet. 21 (citing *Halperin* v. *eBanker USA.com, Inc.*, 295 F.3d 352, 359 (2d Cir. 2002) (holding that cautionary language rendered statement non-misleading under "bespeaks caution" doctrine as a matter of law); *Fecht* v. *Price Co.*, 70 F.3d 1078, 1081-83 (9th Cir. 1995) (addressing effect of cautionary language on materiality and falsity requirements); *Shaw* v. *Digital Equip. Corp.*, 82 F.3d 1194, 1213-14 (1st. Cir. 1996) (same)). Because the Fifth Circuit was focused here on scienter, petitioners' cited cases are inapposite. Moreover, unlike petitioners' cases, neither the district court nor the Fifth Circuit relied on the existence of cautionary language as a stand-alone basis for dismissal or held that the language precluded petitioners' claims as a matter of law.[2] Instead, the courts considered the cautionary disclosures as but one factor in a holistic analysis of the entire complaint to determine whether the required inference of scienter was established.

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[2] *Cf. Lormand*, 565 F.3d at 243-48 (discussing PSLRA cautionary "safe harbor" statement as stand-alone basis for dismissal); *Halperin*, 295 F.3d at 359 (discussing "bespeaks caution" doctrine as stand-alone basis for dismissal).

This case thus presents a poor vehicle for addressing the sufficiency of cautionary language on a motion to dismiss. TXU's disclosures were not merely "boilerplate" but rather were specifically tailored to the company's circumstances at the time they were made, and they were just one factor in the lower courts' comprehensive scienter analysis. Given the lack of any disagreement in the circuits, there is no basis for this Court to address that issue. But if the Court were ever to do so, it should do so in a case that squarely presents the question whether cautionary language can be a sufficient independent ground for dismissal.

II. THE FIFTH CIRCUIT'S DECISION INVOLVES THE CORRECT APPLICATION OF SETTLED LAW.

Far from identifying any circuit split or controversial legal issue of national importance warranting certiorari, the petition is simply a run-of-the-mill challenge to the appellate court's application of settled law to what petitioners admit are the "unique" facts of this case. Petitioners complain that the district court and unanimous Fifth Circuit panel failed to draw the proper inferences from petitioners' factual allegations and should have found a plausible inference of scienter. Even assuming such an exercise in "error correction" could form an appropriate basis for certiorari, there is simply no error to correct in this case.

A. The Fifth Circuit Applied The Same Standard As *Twombly* And *Iqbal*.

In affirming dismissal of the common law claim, the Fifth Circuit applied a standard identical to the one articulated in *Twombly* and *Iqbal*. It required

that the complaint "'set forth specific facts to support an inference of fraud.'" Pet. App. 22a (citation omitted). This squares precisely with *Iqbal*'s holding that the "alleged generally" language in Rule 9(b) does not excuse a plaintiff from pleading sufficient facts to "show" the required state of mind for purposes of Rule 8; the complaint must still plead facts supporting a "plausible" inference of the required intent. The Fifth Circuit correctly recognized that while the PSLRA's "strong inference of scienter" standard does not apply in common law fraud cases, the facts must still support an "inference" sufficient under Rule 8 that the defendants acted with the requisite fraudulent intent. Pet. App. 22a. There is, accordingly, no difference between the standard applied in *Twombly* and *Iqbal* and the standard employed by the Fifth Circuit in affirming dismissal.

B. Petitioners' Allegations Fail To Support A Plausible Inference Of Fraud As Required By Rule 8.

The weakness of petitioners' factual allegations underscores the correctness of the lower courts' decisions to grant and affirm dismissal. This matter presents the classic situation envisioned by *Twombly* and *Iqbal*. The allegations are, at best, merely "consistent with" the defendants' liability and are not sufficient for the court "to draw the reasonable inference that the defendant[s are] liable for the misconduct alleged." *Iqbal*, 129 S. Ct. at 1949.

Every one of petitioners' assertions—that TXU hired outside advisers, communicated with credit rating agencies about the dividend policy, scheduled Board meetings to discuss the dividend policy, and ultimately decided to increase the dividend after the

tender offer—is fully consistent with TXU's disclosure that it was "review[ing]" and "evaluat[ing]" the dividend during the tender offer. Petitioners do not allege that TXU took a single action inconsistent with its disclosures. Without more, the allegations fail to nudge "across the line from conceivable to plausible," *Twombly*, 550 U.S. at 570, the inference that TXU *must have known* during the tender offer what the final outcome of the dividend and stock repurchase would be and deliberately or recklessly misrepresented or concealed this information during the tender offer. *Id.* at 1955.

Petitioners' proposed inference of fraud is particularly implausible given the absence of any allegation that TXU management received feedback from the credit rating agencies before the tender offer closed, as well as the admissions in petitioners' own "expert report." Those admissions establish that: (i) credit ratings are "predicated on a host of qualitative or judgmental factors" and are "as much an art as it is a science"; (ii) rating agencies "would have been particularly careful in evaluating companies with only marginally investment grade credit ratings" such as TXU, which had a near-junk rating at the time; (iii) during October 2004, "Moody's was conducting overwhelmingly negative rating actions, reviews, and outlooks in the utilities industry" following the downfall of Enron; (iv) nearly 30% of companies that increased their dividends by more than 100% from 2000-06 suffered a ratings downgrade; (v) TXU's energy trading business depended on having an investment-grade rating; and (vi) "[a] single notch decline" in TXU's rating would have had "disastrous effects on the Company * * *." Pet. App. 117a-125a, 142a-143a, 164a. In light of

these concessions, it is not surprising the district court and Fifth Circuit found petitioners' fraud allegations to be insufficient.

The allegations in this case are just as insufficient as the allegations in *Twombly* and *Iqbal*. In *Twombly*, the plaintiff asked the Court to infer an agreement to restrain trade from various allegations of parallel conduct by different parties to resist competition. *Twombly*, 550 U.S. at 564. In *Iqbal*, the plaintiff asked the Court to infer discriminatory intent from the allegation that Arab Muslims were detained in disproportionate numbers after the attacks of September 11, 2001, and held under highly restrictive conditions until cleared by the FBI. In both cases, the Court held the allegations were, at best, merely "consistent with" the possibility of tortious conduct and did not cross the line into "plausibility." This case likewise fails to cross that threshold given that TXU expressly disclosed it was reviewing the dividend at the same time as the tender offer and acted consistently with its disclosures.

Petitioners ignore this Court's repeated commands that allegations be evaluated "collectively" and attempt to fabricate various bright-line legal issues based on individual allegations divorced from their broader context. For example, petitioners claim the September disclosures regarding TXU's review of the dividend and stock repurchase policies were "boilerplate" and therefore should be freely disregarded. But this allegation ignores the specific context in which the disclosures were made. Just four months earlier, in May 2004, TXU disclosed that it anticipated being in a position to recommend a re-evaluation and increase in TXU's dividend policy by

2006. Pet. App. 63a-64a. The September 2004 disclosures, however, advised investors that TXU had *already begun evaluating* its dividend policy at the time of the tender offer.[3] As the district court noted, nearly 35% of potential class members declined to participate in the tender offer after receiving these statements. Pet. App. 40a. Given the specific context of TXU's disclosures, the Fifth Circuit correctly determined that petitioners failed to allege facts supporting a plausible inference of scienter.

Petitioners similarly insist that the proximity in time between the close of the tender offer and the announcement of the dividend increase and stock repurchase should be sufficient by itself to support the required inference of fraud, without regard to the context of petitioners' allegations. Pet. 9-10. Again, however, whether timing is probative of fraud in a particular action is a case-by-case determination depending on the specific quantum of facts alleged. The Fifth Circuit has found timing to be probative of scienter where the overall context warrants such an inference.[4]

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[3] Petitioners' assertion that they missed the significance of the September 2004 disclosures, Pet. 4, is particularly unconvincing given petitioners' claim that they are "sophisticated" investment entities who are particularly attuned to TXU's disclosures. *Id.* at 14.

[4] *See Plotkin* v. *IP Axess Inc.*, 407 F.3d 690, 698 (5th Cir. 2006) ("Nevertheless, allegations of later-emerging facts can, in some circumstances, provide warrant for inferences about an earlier situation. For example, the fact that a business files for bankruptcy on 'Day Two,' may, under the right surrounding circumstances, provide grounds for inferring that the business was performing poorly on 'Day One.'"). And other courts have found timing insufficient by itself to support an inference of fraud when the totality of factual allegations do not justify an

In this case, however, the Fifth Circuit properly held that when petitioners' allegations are taken in context and evaluated collectively, the mere proximity between the close of the tender offer and the announcement of the dividend increase and stock repurchase fail to support a plausible inference of fraud. As noted above, petitioners' own expert conceded that credit ratings are complex and subjective and would likely be affected by a dividend change at a company like TXU, and that a change in TXU's rating would have been disastrous for the company. As a result, petitioner's own factual allegations establish that the views of the credit agencies, which were not received until after the tender offer closed, were critical to any dividend decision. The Fifth Circuit thus correctly held that no plausible inference of fraud can be discerned from the simple fact that the decision to increase the dividend was not made until after the rating agencies' input was received, particularly given that TXU also expressly disclosed that the dividend and stock repurchase review was occurring at the same time as the tender offer.

Petitioners' "motive" allegations are similarly deficient. *See* Pet. 31. In *Tellabs*, this Court

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inference of fraud. *See Yourish* v. *Cal Amplifier*, 191 F.3d 983, 997 (9th Cir. 1999) ("[T]he temporal proximity of the August disclosure to the June and July statements, without more, is insufficient to satisfy Rule 9(b)"); *Gross* v. *Summa Four, Inc.*, 93 F.3d 987, 995 (1st Cir. 1996) (no inference of scienter when proximity was five weeks); *In re Digital Island Sec. Litig.*, 223 F. Supp. 2d 546, 555-56 (D. Del. 2002), *aff'd*, 357 F.3d 322 (3d Cir. 2004) (fact that company disclosed two successful deals within three weeks after tender offer completed, including one deal two days after offer, does not establish that company had knowledge of these transactions at time tender offer was made).

recognized that the presence or absence of "motive" allegations is not dispositive of whether the required inference of fraud has been pled, which depends on the totality of the complaint. *Tellabs*, 551 U.S. at 325. The only "motives" alleged by petitioners are that: (i) TXU wanted to complete the tender offer and (ii) Wilder wanted to increase the value of his personal stock holdings. To infer fraudulent intent from universal motives such as these would effectively eliminate the scienter requirement in fraud cases. The Fifth Circuit's refusal to indulge such inferences is consistent with the approach taken in other circuits and is fully in line with *Iqbal*'s command that allegations be considered in context.[5]

Finally, the petition does not challenge the Fifth Circuit's articulation of the disclosure standard for tender offerors, which further undermines any conceivable inference of fraud from TXU's disclosures. Under Fifth Circuit precedent, a tender offeror "is not required to make predictions of future behavior, however tentatively phrased, which may

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[5] *See, e.g., Institutional Investors Group* v. *Avaya, Inc.*, 564 F.3d 242, 278 (3d Cir. 2009) ("'[M]otives that are generally possessed by most corporate directors and officers do not suffice,'" and a "general corporate desire to retire debt and raise funds and obtain credit on favorable terms" is insufficient to support a strong inference of fraud) (quoting *Kalint* v. *Eichler*, 264 F.3d 131, 139 (2d Cir. 2001)); *Cozzarelli* v. *Inspire Pharm Inc.*, 549 F.3d 618, 627 (4th Cir. 2008) ("[T]he motivations to raise capital or increase one's own compensation are common to every company and thus add little to an inference of fraud"); *GSC Partners CDO Fund* v. *Washington*, 368 F.3d 228, 237 (3d Cir. 2004) ("In every corporate transaction, the corporation and its officers have a desire to complete the transaction, and officers will usually reap financial benefits from a successful transaction. Such allegations alone cannot give rise to a 'strong inference' of fraudulent intent.").

cause the offeree or the public investor to rely on them unjustifiably." *Susquehanna Corp.* v. *Pan Am. Sulphur Co.*, 423 F.2d 1075, 1085-86 (5th Cir. 1970). This approach is consistent with that taken by other courts.[6] In light of this standard, it can hardly be said that TXU's disclosure that the dividend was "under review," without providing further speculation regarding the likelihood, magnitude, or timing of any possible dividend change, was such an extreme departure from the standard of ordinary care as to be reckless or fraudulent.

Accordingly, taking the allegations collectively as *Twombly* and *Iqbal* require, the Fifth Circuit correctly concluded that the inference of fraud from petitioners' factual allegations did not cross the threshold from "permissible" to "plausible."

C. The Fifth Circuit Did Not Engage In Impermissible Fact-Finding.

Petitioners also incorrectly assert that the lower courts resolved disputed issues of fact and failed to

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[6] *See Warner Commc'ns, Inc.* v. *Murdoch*, 581 F. Supp. 1482, 1491 (D. Del. 1984); *Todd Shipyards Corp.* v. *Madison Fund, Inc.*, 547 F. Supp. 1383, 1387 (S.D.N.Y. 1982); *see also Reiss* v. *Pan Am. World Airways*, 711 F.2d 11, 14 (2d Cir. 1983); *Chromalloy Am. Corp.* v. *Sun Chem. Corp.*, 611 F.2d 240, 248 (8th Cir. 1979); *Shamrock Holdings, Inc.* v. *Polaroid Corp.*, 709 F. Supp. 1311, 1327 (D. Del. 1989). The principle that contingent disclosures are not required has been reiterated numerous times in the merger context, where it is well-settled that tender offerors are not required to disclose preliminary merger discussions and even tentative merger agreements. *See Taylor* v. *First Union Corp. of S.C.*, 857 F.2d 240, 244-45 (4th Cir. 1988); *Mo. Portland Cement Co.* v. *H.K. Porter Co.*, 535 F.2d 388, 398 (8th Cir. 1976); *Feder* v. *MacFadden Holdings, Inc.*, 698 F. Supp. 47, 51 (S.D.N.Y. 1988); *Berman* v. *Gerber Prods. Co.*, 454 F. Supp. 1310, 1316, 1318 (W.D. Mich. 1978).

take petitioners' allegations as true. Pet. 24-26. For example, petitioners argue that the Fifth Circuit accepted TXU's account of the need for credit rating input before making a recommendation regarding the dividend policy. Petitioners inaccurately assert throughout the petition that the lower courts "decide[d] contested facts," "resolve[d] disputes of fact," "chose ultimately to credit TXU's account of the facts," "resolve[d] contested factual issues," "resolve[d] contested facts," "credit[ed TXU's] rendition of facts," offered a "summary resolution of disputed facts," and engaged in "what can only be described as fact finding." *Id.* at 6, 14, 26, 28, 29.

Petitioners misunderstand the difference between the resolution of disputed facts, which courts are prohibited from doing on a Rule 12(b)(6) motion, and the weighing of inferences from facts that are pled, which courts are *required* to do in determining whether the requisite inference of fraud has been established. The district court and Fifth Circuit did not "credit" one version of facts over another; they simply accepted petitioners' allegations as true and found the inferences from those allegations insufficient. *See* Pet. App. 12a, 36a, 42a-46a.

Importantly, it is petitioners' burden under *Tellabs*, *Twombly*, and *Iqbal* to plead sufficient facts to support the required inference of fraud. Courts are not required to assume facts that have not been pled or accept proffered inferences and legal conclusions as true. In this vein, petitioners offered no specific factual allegation that, before the tender offer closed, TXU management (and Wilder specifically) knew what the dividend recommendation would be or received any assurance from the credit rating agencies that a dividend increase would not affect

the company's credit rating. Particularly given the numerous admissions by petitioners' own expert, the lower courts were not required to take the unwarranted leap of logic urged by petitioners and simply assume that TXU had this information in advance absent a specifically pled fact showing such knowledge. Taken in context and examined holistically, the allegations failed to allege sufficient facts demonstrating that TXU intentionally or recklessly deceived investors regarding its dividend and stock repurchase policies.

III. THIS CASE PROVIDES AN UNSUITABLE VEHICLE FOR REVIEWING THE QUESTIONS PRESENTED.

Petitioners assert that this case presents "an excellent vehicle" for considering the questions presented. Pet. 28. For several reasons, nothing could be further from the truth.

First, any decision on the questions presented in this case will necessarily be confined to its facts and will have little precedential value. As petitioners themselves repeatedly admit, the facts of this case are "unique." Pet. 6, 7, 8. Whether a particular set of facts supports the required inference of fraudulent intent is, of course, "a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Iqbal*, 129 S. Ct. at 1950. The district court must consider the allegations "collectively," and the significance attached to one particular type of allegation "depends on the entirety of the complaint." *Tellabs*, 551 U.S. at 325. A determination whether the specific fact pattern of this case supports the required inference of scienter will necessarily be limited to its facts and will offer little guidance to courts dealing with the near-

infinite array of other conceivable fact patterns that may arise in future cases.

Second, the timing of this case makes it particularly ill-suited for review. As shown above, the lower courts are continuing without difficulty to apply this Court's recent decisions to the myriad factual contexts that come before them. Given that the Court has elucidated different aspects of pleading standards three times in the last three Terms, there is no basis for the Court to revisit those issues yet again. Moreover, given this Court's recent pronouncements, if any change in the law of pleading is needed, it should come from Congress. Indeed, Congress is presently considering a bill that, if enacted, would alter the standards for pleading claims and moot any conceivable action by this Court in this case. *See* Notice Pleading Restoration Act of 2009, S. 1504, 111th Cong. (2009). That is the appropriate forum for debating these issues.

Finally, the scienter issue that petitioners raise is not outcome-determinative. This case would be decided the same way regardless of whether petitioners adequately pled scienter, because their factual allegations fail to establish the existence of another critical element of their cause of action—a false or misleading statement. The Fifth Circuit noted that "it is not clear that Appellees ever issued a materially misleading statement or omission of fact concerning the dividend policy." Pet. App. 16a. The district court likewise concluded that "simply because the plaintiffs were misled, the court does not therefore find TXU's statements to be misleading; the plaintiffs fail to show *how* each statement was fraudulent." *Id.* 47a. Needless to say, a party cannot act with the requisite intent to defraud if it never

made a false or misleading statement in the first place. Respondents thus would be entitled to raise that issue as an alternative ground for affirmance here—or as an alternative ground for dismissal on remand—and it is thus entirely possible, if not likely, that the judgment would remain intact without respect to petitioners' scienter-based argument.

* * *

In sum, this case provides no basis for certiorari. The pleading issues have been addressed by *Twombly* and *Iqbal*. Petitioners identify no avalanche of fraud cases involving self-tender offers suggesting a pressing issue for certiorari, let alone any controversy regarding how Section 14(e) claims should be pled. And the weakness of petitioners' factual allegations, the correctness of the Fifth Circuit's approach, as well as the inherently fact-specific nature of the questions presented render this case an unsuitable candidate for further review.

CONCLUSION

For these reasons, the petition should be denied.

Respectfully submitted,

GERARD G. PECHT*
RICHARD S. KRUMHOLZ
FULBRIGHT & JAWORSKI L.L.P.
2200 Ross Avenue, Suite 2800
Dallas, Texas 75201-2784
(214) 855-8050

PETER A. STOKES
FULBRIGHT & JAWORSKI L.L.P.
600 Congress, Suite 2400
Austin, Texas 78701
(512) 536-5287

* *Counsel of Record* *Counsel for Respondents*